

Convention on Contracts for the International Sale of Goods

– A Practitioner's View

Peter Villani, *Partner*

Fasken Martineau, Montreal

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Opting Out?

- Many Supply and Sale agreements OPT-OUT of CISG
- Why → “Because everyone else opts out”
- We should have a second-look
- Freedom to contract – use a combination of General Terms and Conditions and the convention – Article 6:

“The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions”

Cautions Typically Cited

- Not tested in the domestic courts
- Not familiar with the terms of CISG
- “Battle of forms”
 - Address through “General Terms and Conditions”
 - However many entities still exclude CISG from their forms – forestry products, mining

Cautions Typically Cited

Article 50 – Buyer may reduce the price of a good in cases of non-conformity

“If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time...”

A Second-Look – Some Considerations

- Explosion of international trade since adoption
- Not written for lawyers – accessible, practical language
- Flexible – may derogate from CISG provisions
- Avoids discussions over choice of law clauses
- Operates in conjunction with *lex mercatoria*
- May be useful for entities with “large volumes”
 - Chemicals
 - Pharma

Example of Clauses in General Terms and Conditions

Governing Law: The Contract will be governed by and construed in accordance with the laws in effect in (a) the Canadian Province where the address of Buyer stated in the applicable Purchase Order or the Separate Agreement is located, (b) England if the address of Buyer stated in the applicable Purchase Order or the Separate Agreement is located in the United Kingdom or (c) the State of New York, U.S.A. if the address of Buyer stated in the applicable Purchase Order or the Separate Agreement is located outside Canada and the United Kingdom, without giving effect in any case to the conflict of laws rules of the applicable jurisdiction

Example of Clauses in General Terms and Conditions

Incoterms: With regards to Incoterms, "Incoterms 2000" of the International Chamber of Commerce will govern in all cases. In the event of conflict between these Conditions or any other provisions of the Contract and Incoterms, these Conditions and the other provisions of the Contract will prevail

Exclusion of Vienna Convention: The terms of the United Nations Convention on Contracts for the International Sale of Goods will not apply to this Agreement

Sometimes also exclude the United Nations Convention on the Limitation Period in the International Sale of Goods

Example of Clauses in General Terms and Conditions

- Others merely include a governing law clause without expressly referring to the exclusion of the convention
- Others say:
 - The laws of the Province of Québec shall apply, but excluding any laws relating to the International Sale of Goods

Example of Clauses in General Terms and Conditions

- Clauses may get complicated, for a multinational clauses go through each country where operates and may be party to a Purchase Order
 - As many as **10** countries with a default clause stating:
“For those Entities issuing Purchase Orders from countries not identified above, the laws of the country, and if applicable, state or province of the Entity issuing the Purchase Order will apply without regard to or application of its principles or laws regarding conflicts of laws, and excluding the UN Convention on Contracts for the International Sale of Goods of 1980 (and any amendments or successors thereto)”

Conclusion

- Have a second-look at the CISG
- If CISG excluded → Clear exclusion

